

**CHIEF ANNE KIRKPATRICK'S ADDENDUM to
EXECUTIVE FORCE REVIEW BOARD REPORT
Use of Force No.: 18F-0067**



I. EFRB Findings re Use of Force

My charge is to analyze all the facts and circumstances in this matter to determine whether there is sufficient evidence to determine that a member's conduct was in violation of law or policy. Absent a preponderance of evidence that the conduct is out of compliance with law or policy, there is no violation.

The policy that governs this matter is Department General Order K-3: Use of Force. The relevant sections of this 12-page policy are the definitions of Reasonable Force (Section II.A), the definition of Immediate Threat (Section II.B) and Discharging a Firearm at a Person (II.D).

Starting with the authority to discharge a firearm, the policy states that lethal force ... "is authorized only when there is reasonable cause to believe there is an immediate threat of death or serious bodily injury." Thus, in determining whether there was reasonable cause to use lethal force, my threshold question is whether the facts and circumstances in this case meet the criteria of an "immediate threat." The policy states:

"An immediate threat is considered to exist if a person has demonstrated actions that would lead one to reasonably believe the suspect will continue to pose a threat of death or serious bodily injury if not apprehended without delay. A person is an immediate threat, if the person is reasonably perceived by a member or employee to have present intent, means, opportunity and ability to complete the threat, regardless of whether the threatened action has been initiated." (Emphasis added.)

If the threshold for what constitutes an immediate threat is met, then the next analysis, under both law and policy, is to determine if the amount of force used was "objectively reasonable to affect a lawful police purpose and protect the safety of members or others based upon the totality of the circumstances." (Emphasis added.)

The evidence in this case is vast: it includes hours of PDRD video and audio (including subject and witness interviews), and hundreds of pages of documentary evidence. The Internal Affairs Division (IAD) Report of Investigation, including its analysis and recommended findings, is more than 830 pages long. The Executive Force Review Board (EFRB or the Board) took three separate hearing days to evaluate both IAD's and CID's evidence and presentations, and to make their findings. In evaluating the Board's conclusions and recommendations, I personally reviewed the underlying evidence, including, but not limited to, the PDRD footage (including the enhanced video and expert report), subject and witness statements, and the autopsy report. For the reasons described below, I accept the analysis and unanimous findings by both IAD and the EFRB that the lethal force used in this case was within law and policy.

Each of the four officers who used lethal force stated that they did so only after they saw Pawlik begin to raise his arm and hand off of the ground and point the gun in their direction. The video analysis was inconclusive regarding the specific movement of Pawlik's lower arm, hand and the gun just prior to the shooting. However, it is not inconsistent with the officers' statements that Pawlik looked at the officers, raised his arm and pointed the gun toward them. Also, other evidence corroborates the statements. For example, the statement that he gripped the gun is supported by the fact that the gun was flung behind Pawlik when he was shot. Moreover, the evidence shows that Pawlik did not comply with numerous (12) commands to take his hand off the gun as he looked toward the officers and moved in a rocking motion to sit up. Despite Pawlik's movement and failure to comply with numerous commands, the officers did not initially fire their weapons. Thus, the evidence does not contradict the officers' statements that they fired only after perceiving a lethal threat, when Pawlik raised his arm and pointed the gun in their direction.

The most compelling evidence of a reasonably perceived threat was that the five officers shot almost simultaneously at Mr. Pawlik, with all shots fired within 2.23 seconds. I find this evidence persuasive and corroborative of the officers' statements regarding their perceptions of an immediate threat. In other words, the evidence supports that this was not the perception of just one officer, with sympathetic fire trailing the initial shot after a delay; this was the perception of multiple officers. The evidence shows the individual shots occurred too closely together to be sympathetic fire. This is illustrated in a frame-by-frame analysis of the shooting. There are at least three rounds distinguishable in the PDRD video which was recorded at a rate of 30 frames per second. The first shot is captured at frame #1714 and the more visible bean bag contrail is captured at frame #1731.¹ There are also several shots between the first shot and the bean bag round. The video analysis was not able to discern which shots came from each particular officer. However, we know that the first rifle shot and the bean bag were two different officers. They occurred just over a half second apart. These shots are so close together that they are not likely sympathetic fire. Based on my training and experience, I know that studies in the field of human factors teach that firing a weapon at a threat or other stimulus takes time to perceive and react. Accordingly, sympathetic fire generally includes a sufficient delay for the second officer firing to perceive and react not to a lethal threat – but to the sound of the first weapon firing. Here, at least three of the shots took place within 0.5 seconds, and all 22 lethal rounds and one less-lethal bean bag round were fired within 2.23 seconds. The multiple shots fired almost simultaneously and the incredibly short period of time between the first shot and the bean bag deployment (.567 seconds), suggest that (at least two of) the officers perceived and reacted to the same stimulus or threat. Also compelling is the fact that the officers stopped their fire almost simultaneously. The video evidence that the officers started and stopped their fire almost simultaneously is persuasive to me that the five officers independently perceived a lethal threat and independently perceived when that threat no longer presented itself.

Lethal force analysis requires an assessment of the reasonableness of the officers' perceptions under the totality of the circumstances without the benefit of 20/20 hindsight. Based on the evidence, I find that there is not a preponderance of evidence of a violation of policy or law. Indeed, the greater weight of the evidence shows that each officer independently concluded that Pawlik posed a lethal threat. I find that the evidence shows that the officers' perceptions of an immediate threat were reasonable under the circumstances.

¹ Taking into consideration that the PDRD footage is 30 frames per second (FPS), the bean bag round was fired 17 frames after the first round (.567 seconds).

The EFRB report contains extensive assessment of the level of risk the officers were exposed to considering they had the benefit of the Bearcat for cover. The SMEs on Bearcat use and the Patrol Rifle Officer program stated that the protocols and training for use of the Bearcat do not anticipate that everyone will be completely covered and entirely protected from the threat of gunfire. The Bearcat does have portholes in the side armor of the vehicle but according to the SME, these do not allow for a conventional shooting position and are not ideal platforms for proper rifle use. Accordingly, officers are trained to use the body of the bearcat for cover. While the Bearcat provides enhanced cover, officers will still be partially exposed. It is not so much their choice to be exposed as much as it is their training.²

As I step back and reflect on the totality of the evidence presented at the EFRB, I am mindful of the Supreme Court's language in Graham v. Connor, 490 U.S. 386 (1989) regarding proper perspective and the balancing and analysis required in evaluating the force. The test of reasonableness under the Fourth Amendment requires careful attention and weighing of the totality of the facts and circumstances of each individual case. The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. The Supreme Court noted that officers are forced to make split-second judgments in circumstances that are tense, uncertain and rapidly evolving.³

The loss of an individual's life is a tragic outcome that OPD trains extensively to avoid—a fact borne out by the tremendous reduction in the number of the Department's officer involved shootings in recent years. I am committed to supporting and continuing this trend, and to holding officers accountable when they use unreasonable force. In this case, however, after a careful review and analysis of all of the evidence and the application of the Fourth Amendment's objective reasonableness test, I agree with the recommendation of IAD and the unanimous decision of the EFRB that the force used was within law and policy.

II. Findings re Other Allegations, Including Supervisory Failures

Officer Tanaka, Allegation: Violation of MOR 314.39-2, Performance of Duty-General for failure to advise the Communications Division of his rifle deployment in violation of DGO K-06 and for self-deploying as lethal cover.

IAD's initial recommendations in this case did not address a potential failure for Officer Tanaka, but after IAD's initial presentation to the Board, the Board asked IAD to consider whether Officer Tanaka engaged in misconduct for failing to advise the Communications Division of his rifle deployment. IAD returned with a recommendation of Exonerated. The Board had a split vote on this issue. Two of the three members of the Board voted to sustain Officer Tanaka for this failure. I reviewed the issue of Officer Tanaka's deployment in detail, including a review of the relevant PDRD footage. The purpose of the policy is to put one's supervisor on notice that a rifle has been deployed. It requires an officer to advise Communications when it is practical to do so in order to keep one's supervisor informed of resources. I find this a technical violation given the exigency of the circumstances. When Officer Tanaka self-deployed his rifle while next to his Sergeant, it was reasonable to assume that his supervisor was on notice that he had deployed his rifle. Therefore, on this question alone relating to Officer Tanaka's deployment, I would come to a finding of Exonerated.

² Also, if a shot were to be fired into the air or past the bearcat, the bearcat would not protect members of the public or other officers in the area.

³ Graham, 490 US at 396.

However, I also evaluated whether it was appropriate for Officer Tanaka to self-deploy as lethal without being directed to do so by the DAT leader, Sgt. Negrete. While neither IAD nor the Board came to an explicit finding regarding Tanaka's decision to self-deploy, both elicited evidence regarding its appropriateness, and I find it to be an allegation of potential misconduct that should be specifically addressed. With regard to lethal cover, the Department trains with the objective to minimize the use of lethal force by, among other things, designating specific officer(s) to the role of lethal cover. Given that two other officers were designated and positioned as lethal cover, I believe that Officer Tanaka should not have self-deployed as lethal. However, the question is whether his decision to do so was unreasonable for an officer of his experience and training. The subject matter expert stated that officers are trained that they can self-deploy to fill a gap or position in a DAT. The training allows flexibility for officers to bring their skill and training to bear during a critical incident. When Officer Tanaka arrived on scene, the situation changed quickly, with the heightened threat of Pawlik, who began moving and failing to obey commands. Neither the IAD investigation nor the EFRB provided evidence regarding specific training Officer Tanaka received about the expectations of a utility officer in circumstances such as those at issue here that would support a Sustained finding. Accordingly, it is unclear whether or not Officer Tanaka should have known under the circumstances not to self-deploy as lethal. The appropriate finding for MOR 314.39-2, Performance of Duty-General regarding **Officer Tanaka's self-deployment is Not Sustained**.

Lieutenant Yu, Allegation: Violation of MOR 234.00-2, Failure to fulfill his command responsibilities.

Initially, IAD recommended Lieutenant Yu be Exonerated for his supervision of the scene as the Commanding Officer. During the first round of EFRB deliberations, the Chair of the Board sent IAD back for further review of the facts and circumstances, including further exploration of supervisory responsibilities of incident commanders with an appropriate SME. The Board also directed that an IAD Commander with Incident Commander experience make the analysis and recommendation. At the second convening of the EFRB, IAD changed its recommendation from Exonerated to Sustained. The Board unanimously voted that there were shortcomings in Lt. Yu's exercise of his command responsibilities and oversight. In my review, I found Lieutenant Yu took many appropriate actions that I expect of a commander over a critical incident. His statement revealed his critical thinking skills. For example, he took command action when he overruled Sergeant Negrete's assignment of less lethal from Sergeant Webber to Officer Phillips. He also made sure that his sergeants were dispersed properly around the perimeter and ensured medical was staged. However, I agree that Lieutenant Yu deferred to Sergeant Negrete too much and he should have had more firm control of the management of the scene as articulated by the Board. I also agree that after he was briefed by Sgt. Negrete, Lt. Yu should have recognized that Sgt. Negrete failed to plan for one of the three basic contingencies all DAT leaders must consider—*i.e.*, how to react to foreseeable exigencies created by the suspect. Accordingly, for the reasons stated in IAD's Addendum Memorandum (dated 8 Jan 19) and the Board's report, I find Lieutenant Yu **Sustained for a class 2 violation of command responsibilities**.

Sergeant Negrete, Allegation: Violation of MOR 285.00-1, Failure to Supervise

Initially, IAD recommended to the Board that Sergeant Negrete be sustained for a class 2 violation for failures in his supervision. The Chair sent IAD back to further analyze whether the facts and circumstances surrounding his supervision rose to the level of a class 1 violation. After this review, IAD returned and reaffirmed its recommendation for a sustained finding of a class 2 violation. The Board

voted 2 to 1 to sustain Sergeant Negrete for the class 1 violation, finding there was a gross dereliction of duty.

In my analysis, I reviewed our MOR on gross dereliction of duty, the standard required for this violation to be a class 1 instead of a class 2.⁴ Gross dereliction of duty is a high standard. It requires both carelessness and a reckless disregard for the consequences of the member's conduct. I took guidance from case law addressing the standard of recklessness, including the following. In *Delaney v. Baker*, the California Supreme Court stated: "'Recklessness' refers to a subjective state of culpability greater than simple negligence, which has been described as a 'deliberate disregard' of the 'high degree of probability' that an injury will occur. [Citations omitted.] Recklessness, unlike negligence, involves more than 'inadvertence, incompetence, unskillfulness, or a failure to take precautions,' but rather rises to the level of a 'conscious choice of a course of action . . . with knowledge of the serious danger to others involved in it.' [Citations omitted.] *Id.*, (1999) 20 Cal. 4th 23, 31-32.

Similarly, in *Conservatorship of Gregory v. Beverly Enterprises, Inc.*, the court found that the following instruction adequately defined "recklessness": "[T]he term 'recklessness' requires that the defendant have knowledge of a high degree of probability that dangerous consequences will result from his or her conduct and acts with deliberate disregard of that probability or with a conscious disregard of the probable consequences." *Id.*, (2000) 80 Cal. App. 4th 514, 521.

Reckless disregard is a degree of culpability greater than both ordinary negligence and "gross negligence." "'Ordinary negligence'"—an unintentional tort—consists of a failure to exercise the degree of care in a given situation that a reasonable person under similar circumstances would employ to protect others from harm. [Citation.] 'Gross negligence' long has been defined in California and other jurisdictions as either a 'want of even scant care' or 'an extreme departure from the ordinary standard of conduct. [Citation.]' *City of Santa Barbara v. Superior Court* (2007) 41 Cal. 4th 747, 753–54; *see also*, *e.g.*, *Hass v. RhodyCo Prods.* (2018) 26 Cal. App. 5th 11, 32, *review denied* (Nov. 28, 2018). "'[G]ross negligence' falls short of a reckless disregard of consequences." *E.g.*, *Hass* at 32.

In assessing Sergeant Negrete's conduct under these standards, I find that his decisions, though very negligent, did not rise to the level (degree) of conscious and deliberate disregard for the safety of others, including Mr. Pawlik. Although his failures may stem from inadvertence, including a clear failure to follow his training regarding the three basic contingencies of a DAT and the role of a DAT leader, I do not see his failure to take precautions as evidence of deliberate disregard for Mr. Pawlik's safety. Sergeant Negrete's actions in taking on multiple roles and not planning adequately for foreseeable contingencies were supervisory failures. However, his decisions cannot be characterized as being done with reckless disregard. Instead, the evidence shows that in his planning he sought to resolve the situation with everyone's safety in mind, determining that he was the best person for the talker/cuffer role and believing that he was planning for contingencies with the goal of taking Mr. Pawlik safely into custody. Sgt. Negrete assigned DAT roles and articulated a detailed plan for two different scenarios, which he shared with the incident commander. The subject matter expert testified during the EFRB that the DAT leader takes an overall big picture/strategic view of the incident and sergeants are not taught to take on one of the more specific roles. Nonetheless, it does not appear that sergeants are explicitly

⁴ MOR 175.99: GROSS DERELICTION OF DUTY – Failure to use reasonable care to protect life and/or property and to safeguard the legal rights of individuals. Gross dereliction of duty is characterized by carelessness and a reckless disregard for the consequences of the member or employee's conduct.

trained they are not to take on a specific team-member role. In fact, the subject matter expert said that a team leader may take on an additional role such as talker/cuffer depending on the circumstances.

The Board Chair pointed out that Sergeant Negrete's decision to deploy his own rifle was unnecessary given the fact that he had two lethal cover officers assigned. Although I do not disagree with this assessment, I do not believe it supports a finding of gross dereliction of duty under the circumstances. The subject matter expert told the Board that the DAT team leader's big picture role does not preclude the sergeant from defending him/herself or others from a threat. Sgt. Negrete decided to deploy his rifle in response to what he perceived as a lethal threat to himself and his officers. Moreover, he did not fire his weapon at Mr. Pawlik when Mr. Pawlik gained consciousness, began rocking back and forth to sit up and failed to heed multiple warnings. The evidence does not contradict his statement that he fired at the moment he felt their lives were in danger.

In sum, during the course of the incident, a review of Sgt. Negrete's conduct in its entirety under the totality of the circumstances shows errors in judgment and action. Errors that occurred in a very serious situation with the lives of both Mr. Pawlik and others at stake. However, despite his failures, his conduct viewed as a whole does not demonstrate gross misconduct carried out with carelessness and reckless disregard for the safety of others. Instead, there is evidence of his desire to resolve the situation without harm to anyone, including Mr. Pawlik. Accordingly, I find Sergeant Negrete **Sustained for a class 2 failure to supervise.**